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THE BANK OF NOVA SCOTIA BHD v. SAUNAH KASNI & ORS

HIGH COURT MALAYA, SHAH ALAM
LIM CHONG FONG JC
[CIVIL SUIT NO: 22NCVC-515-08-2013]
25 MAY 2015

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LAND LAW: *Indefeasibility of title and interests – Forged transfer – Whether transfer of property by first defendant to second defendant defeasible – Whether discharge of charge defeasible – Whether fourth defendant's charge impugned – Whether transfer of property procured by fraud or forgery – Whether fourth defendant bona fide chargee for valuable consideration – National Land Code, s. 340(2), (3)*

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PUBLIC AUTHORITIES: *Registrar of Land Titles – Negligence – Breach of statutory duty – Whether negligent in issuing various versions of issue document of title – Whether had breached duty of care – Whether plaintiff suffered loss and damage*

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The first defendant purchased a double storey detached house ('the property') in 2002. The plaintiff granted a loan facility to the first defendant for the purpose of financing the purchase of the property. Pursuant to the aforesaid loan facility, the first defendant on 7 November 2002 executed a charge over the property in favour of the plaintiff ('the charge'). The first defendant defaulted on the repayment of the loan facility and the plaintiff accordingly commenced foreclosure proceedings against the first defendant. The High Court granted an order for sale of the property on 15 July 2004 and the original issue document of title ('IDT') of the property together with the duplicate charge was handed to the High Court for purposes of auction. Accordingly, the property was auctioned off and sold to the successful bidder. In the meantime, the charge was discharged on 26 February 2008 purportedly by the plaintiff. The property was then transferred to the second defendant on 24 March 2008 purportedly by the first defendant and concurrently charged to the fourth defendant. By a land search done by the plaintiff on 1 October 2009, the plaintiff discovered the aforesaid discharge of charge as well as transfer of the property to the second defendant with a new charge created over the property by the fourth defendant. Subsequently, the plaintiff filed the present suit. In this suit, the plaintiff primarily contended that (i) the discharge of the charge, transfer of the property to the second defendant and charge over the property in favour of the fourth defendant were procured by fraud or forgery and invalid in law; and (ii) the third defendant was negligent in failing to exercise due care and skill in issuing different versions of IDT of the property notwithstanding that the original IDT was in the custody and control of the High Court. The issues that arose for the determination of the court, *inter alia*, were (i) whether the discharge of the charge and the transfer of the property from the first

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defendant to the second defendant was procured by fraud or forgery; (ii) whether the fourth defendant's interest was acquired in good faith and for valuable consideration; (iii) whether the third defendant was negligent in the issuance of various versions of IDT of the property as alleged by the plaintiff.

Held (partially allowing plaintiff's claim):

(1) The plaintiff had never given any instruction to execute the discharge of the charge. PW3, the lawful attorney and authorised signatory of the plaintiff had strenuously denied that she signed the discharge form 16N by reason that the first defendant's loan remained unpaid at that time. PW1, a hand writing expert produced a signature verification report after undertaking a meticulous examination of PW3's contemporaneous specimen signatures with the impugned signature on the form 16N and concluded that the impugned signature was most probably of different authorship from that in the specimen signatures. The signature in the form 16N discharge of the charge was a plain and undisguised forgery of PW3's signature. Therefore the discharge of the charge is defeasible by virtue of s. 340(2)(b) of the National Land Code ('NLC'). (paras 30, 31, 32, 34 & 38)

(2) Although the plaintiff pleaded and submitted on both fraud and forgery, the plaintiff did not identify the perpetrator of the fraud. Nonetheless, the transfer of the property by the first defendant to the second defendant was procured by forgery on the balance of probabilities. Accordingly, the transfer of the property by the first defendant to the second defendant is defeasible by virtue of s. 340(2)(b) of the NLC. (paras 45 & 46)

(3) In respect of the plaintiff's allegation of fraudulent procurement of the registration of the fourth defendant's charge in light of the original IDT of the property being in the custody and control of the High Court at the material time, the plaintiff has neither identified the perpetrator of the fraud nor led sufficient evidence on the scheme of the fraud. Therefore, fraud has not been adequately established in the circumstances to the higher standard of proof beyond a reasonable doubt. (para 49)

(4) Since all the three IDTs showed the first defendant as the registered proprietor of the property, the concept of title *void ab initio* is inapplicable to defeat the fourth defendant's charge over the property. It remained a mystery as to how three IDTs of the same property subsisted at the same time without the destruction of two of them as required by law in the 14th Schedule to the NLC. The third defendant was plainly in breach of its statutory duties. Although the second and third IDTs were not *void ab initio*, they are defeasible pursuant to s. 340(2) of the NLC. (paras 56, 57 & 59)

(5) If the transfer and title as registered in favour of the second defendant are avoided, the fourth defendant's charge must necessarily be avoided too because its underlying sub-stratum has been impugned as well by operation of law. The fourth defendant could not take advantage of the proviso in s. 340(3) of the NLC. In other words, the charge is defeasible even if the fourth defendant was a *bona fide* chargee for valuable consideration because the charge was not an interest in the property that was subsequently granted out. Also, there is a lurking suspicion that the fourth defendant was just too keen to close the loan financing deal with the second defendant. In the circumstances, the fourth defendant's interest in the charge failed to qualify as that acquired in good faith pursuant to the proviso to s. 340(3) of the NLC. (paras 62, 68, 80 & 81)

(6) The plaintiff has in its re-amended statement of claim prayed for declarations that the discharge of the charge, transfer of the property from the first defendant to the second defendant and the fourth defendant's charge be declared null and void and of no effect. There was no reason not to grant the declarations since the discharge of the charge, transfer and fourth defendant's charge are all defeasible. As the result thereof, the plaintiff's claim in negligence against the third defendant becomes unsustainable and redundant by reason that the plaintiff would not suffer any loss and damage once the declarations sought are granted. (paras 86 & 87)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd [2006] 2 CLJ 409 CA ***(refd)***

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***

Low Poh Kim v. Pengarah Tanah dan Galian Negeri Selangor & Ors [2014] 3 CLJ 897 HC ***(refd)***

Malayan Banking Bhd v. Koay Kang Chuwan & Anor [2010] 6 CLJ 172 CA ***(refd)***

Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party) [2014] 8 CLJ 107 HC ***(refd)***

Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2013] 1 CLJ 153 HC ***(refd)***

Siaw Kim Seong v. Siew Swee Yin & Anor [2008] 5 CLJ 441 CA ***(refd)***

Soon Poy Yong v. Westport Properties Sdn Bhd & Ors [2014] 10 CLJ 686 HC ***(refd)***

State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 3 CLJ 271 HC ***(refd)***

Yew Foo Chun v. Wong Nye Keong & Ors [2014] 1 LNS 189 HC ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 45, 73
Government Proceedings Act 1956, ss. 5, 6
National Land Code, ss. 22, 304(4), 340(2)(b), (c), (3)(b), (4)(b)
Penal Code, s. 420

Other source(s) referred to:
Teo Keang Sood and Khaw Lake Tee, *Land Law in Malaysia: Cases and Commentary*, 3rd edn, 2012, LexisNexis, pp 182, 183 & 202

For the plaintiff - Paramjit Singh (Goh Chee Hong with him); M/s Simon Hue & Assocs
For the 1st defendant - Mohd Nasir Abdullah; M/s Mohd Nasir & Co
For the 2nd defendant - Leonard Imban; Insolvency Department, Malaysia
For the 3rd defendant - Kam Sani; State Legal Advisor's Office, Selangor
For the 4th defendant - John Mathew (Heng Yee Keat with him); M/s Christopher & Lee Ong

Reported by S Kahvitha

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This suit is the sequel to SAHC Civil Suit No. 22-221-2009 between Warisan Zamrud Sdn Bhd and Saunah Binti Kasni and three others ("related suit").

[2] The plaintiff herein is a licensed bank and also the fourth defendant in the related suit. The plaintiff financed the first defendant's purchase of a double storey detached house held under H.S.(D) 107738 Lot 1828 Mukim Damansara, Daerah Petaling, Selangor carrying postal address 65, Jalan SS1/22, 47300 Petaling Jaya. Selangor ("property"). The plaintiff's interest was secured and protected by a charge registered over the property.

[3] The first defendant is an individual and also the first defendant in the related suit.

[4] The second defendant is an individual who purchased the property purportedly from the first defendant and is presently the registered proprietor of the property.

[5] The third defendant is the Registrar of Land Titles of Selangor that is involved in land registration pursuant to the National Land Code.

[6] The fourth defendant is a licensed bank that financed the second defendant's purchase of the property and presently has a registered charge over the property.

A **The Trial Process**

[7] By an earlier court order, this suit and the related suit are to be tried by the same judge. They were hence tried one after the other before me commencing with the related suit. However, it was agreed that the judgments will be delivered simultaneously *albeit* separately because the evidence was
B received in both of them independently.

[8] After the filing of this suit, it was discovered that the second defendant was already adjudged a bankrupt on 25 October 2010. Leave to proceed against the second defendant was granted by the bankruptcy court. The trial
C of this suit took seven days on 27, 28 and 30 October 2014, 23 December 2014, 20 and 28 January 2015 and 2 February 2015.

[9] The trial documents were marked as bundles A, A1, A2, B, B1, B2, B3, C and D including documentary evidence in bundles B to B3 which were consented to be of unconditional status B. In the course of the trial, there
D were exhs. P1 to D30(a) that were admitted in evidence.

[10] The following witness gave sworn testimony for the parties:

Plaintiff

(i) Lim Yok Chaw (PW1), a handwriting expert;

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(ii) Inspector Omar Khayyaom bin Arshad (PW2) of the Bahagian Siasatan Jenayah dan Komersial, Polis DiRaja Malaysia, Shah Alam;

(iii) Hui Swee Har (PW3), senior collection officer of the plaintiff bank;

(iv) Wong Chin Seong (PW4), manager of loan and administration of the
F plaintiff's bank;

(v) Shijatul Hazimah binti Mohd Yusoff (PW5), the beneficiary of the property purchased by Perniagaan Myzul in the court auction on 5 March 2008;

G (vi) Syed Mohammad Murad bin Syed Naseem (PW6), son of PW5; and

(vii) Inspector Hari Krishnan (PW7) of the Bahagian Siasatan Jenayah dan Komersial, Polis DiRaja Malaysia, Seremban.

First defendant

H (i) Saunah binti Kasih (DW1), the first defendant herself.

Third defendant

(i) Fazly bin Rosli (DW2), formerly Registrar of Titles at the Selangor Land and Mines Office;

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(ii) Nurul Ashikin binti Ahmad Isa (DW3), administrative officer at the Selangor Land and Mines Office;

(iii) Rahayu binti Abdul Fatah (DW4), administrative assistant at the Selangor Land and Mines Office;

(iv) Hani Inulfarah binti Mohd Isa (DW5), reception clerk at the Selangor Land and Mines Office; and

(v) Zarina binti Mohd Yusof (DW8), information technology officer at the Selangor Land and Mines Office.

Fourth defendant

(i) Basarudin bin Mohd Arshad (DW6), section head, document and disbursement consumer credit and administration centre of the fourth defendant bank;

(ii) Saiful Bahri bin Ahmad Mokhtar (DW7), registered valuer of Nilai Harta Consultant Sdn Bhd;

(iii) Mohd Shairul bin Che Mat (DW9), assistant valuer of Nilai Harta Consultant Sdn Bhd;

(iv) Yam Chung Keat (DW10), an advocate and solicitor of Messrs Yam & Associates;

(v) Vijay Anand a/l Gunasekaran (DW11), a clerk with Messrs Yam & Associates;

(vi) Doraisamy Sri D. Krishanan (DW12), an advocate and solicitor of Messrs Loke Chiew & Zainal;

(vii) Yoong Weng Leong (DW13), an advocate and solicitor of Messrs Hisham Yoong; and

(viii) Mohd Fauzolzakee bin Mohamed Amin (DW14), manager of the fourth defendant's bank, Tanah Merah branch.

[11] After the conclusion of the trial, the parties submitted their written closing submissions in chief and in reply. There was oral clarification with counsel on 1 April 2015 and the parties thereafter submitted further written submission on certain points as directed.

Background Facts

[12] The first defendant purchased the property from a Shaheena Binti Syed Jaafar in 2002. The property is an end lot situated along Jalan SS1/22 and immediately adjacent to the Petaling Jaya Hindu cemetery. There are two crematoriums opposite the cemetery.

[13] By a letter of offer dated 19 September 2002, the plaintiff granted a loan facility of RM1,460,000 to the first defendant for the purpose of financing her purchase of the property.

[14] Pursuant to the aforesaid loan facility, the first defendant on 7 November 2002 executed a charge over the property in favour of the plaintiff which was registered in the Shah Alam Land Registry on 12 November 2002 *vide* Presentation No. 73366/2002 ("charge").

[15] The first defendant defaulted on the repayment of the loan facility and the plaintiff accordingly commenced foreclosure proceedings against the first defendant *vide* KLHC Originating Summons No. S24-973-2003. The High Court granted an order for sale of the property on 15 July 2004. The original issue document of title of the property described as hak milik 100802HSD00107738 versi dua, dated 26 March 2003, a photocopy found in bundle B pp. 39 to 41 ("IDT1") together with the duplicate charge was handed to the Kuala Lumpur High Court for purposes of auction pursuant to the order for sale on 15 April 2005.

[16] Accordingly, the property was auctioned off by the Deputy Registrar of the High Court on 5 March 2008 *vide* application for Execution No. 38-115-2005 and sold to the successful bidder, Perniagaan Myzul at the purchase price of RM645,700.

[17] In the meantime, the charge was discharged on 26 February 2008 *vide* Presentation No. 12838/2008 to the Shah Alam Land Registry purportedly by the plaintiff.

[18] Furthermore, the property was transferred to the second defendant on 24 March 2008 *vide* Presentation No. 21946/2008 purportedly by the first defendant and concurrently charged to the fourth defendant *vide* Presentation No. 21947/2008 to the Shah Alam Land Registry. The photocopy of the relevant issue document of title described as hak milik 100802HSD00107738 versi lima, dated 4 June 2009 is found in bundle B1 pp. 57 to 60 ("IDT3").

[19] By a land search done by the plaintiff on 1 October 2009, the plaintiff discovered the aforesaid discharge of the charge as well as transfer of the property to the second defendant with a new charge created over the property by the fourth defendant, both of which were duly registered on 24 March 2008.

[20] The plaintiff thereafter through PW3 and PW4 lodged police reports accordingly.

[21] Subsequently, the plaintiff filed this suit on 16 August 2013.

[22] From the related suit, I took judicial notice that a Warisan Zamrud Sdn Bhd also purchased the property purportedly from the first defendant on 18 June 2008 and sighted the original issue document of title of the property described as hak milik 100802HSD00107738 versi tiga, dated 5 March 2008 ("IDT2") as shown to Warisan Zamrud Sdn Bhd.

Contentions Of The Plaintiff

[23] In this suit, the plaintiff primarily contended that it was and remains the true chargee over the property. The discharge of the charge, transfer of the property to the second defendant and charge over the property in favour of the fourth defendant were procured by fraud or forgery and hence invalid in law. In addition, the plaintiff contended that the third defendant was negligent in failing to exercise due care and skill by issuing instead of abstaining from the production of different versions of the issue document of title of the property notwithstanding that the original issue document of title was in the custody and control of the high court.

[24] In the premises, the plaintiff in its pleadings claimed, *inter alia*, for the following reliefs:

(i) a declaration that the plaintiff's discharge of charge is null and void and of no effect whatsoever;

(ii) a declaration that the transfer and the fourth defendant's charge are null and void and of no effect whatsoever;

(iii) a declaration that the original issue document of title of the property which is in the control and custody of the Kuala Lumpur High Court is the one and only valid issue document of title of the property;

(iv) an order that the plaintiff's charge be reinstated; and

(v) damages against the first, second and third defendants.

Contentions Of The Defendants

[25] The first defendant in opposition denied that she was involved in the fraud or forgery as alleged by the plaintiff particularly in the sale and transfer of the property to the second defendant.

[26] As for the third defendant, it was contended that the plaintiff's claim was procedurally defective in contravention of ss. 5 and 6 of the Government Proceedings Act 1956. Besides and substantively, the third defendant was not negligent in that the later versions of the issue document of title of the property were issued in accordance with the provisions of the National Land Code based on the presentations made to the Land Registry. Even if the third defendant was negligent, it was entitled to the protection accorded by s. 22 of the National Land Code.

[27] The fourth defendant retorted claiming that it was the *bona fide* chargee of the property for valuable consideration by way of financing the purchase of the property as applied by the second defendant.

Issues for Determination

[28] From the factual matrix as borne out by the pleadings, lists of issues and eventually the closing submissions of the parties, the main issues for determination are in my view as follows *seriatim*:

A (i) whether the discharge of the charge was procured by fraud and/or forgery;

(ii) whether the transfer of the property from the first defendant to the second defendant was procured by fraud and/or forgery;

B (iii) if so, whether the charge of the fourth defendant over the property was accordingly tainted and impugned;

(iv) whether the fourth defendant's interest was acquired in good faith and for valuable consideration;

C (v) whether the third defendant was negligent in the issuance of various versions of the issue document of title of the property as alleged by the plaintiff; and

(vi) accordingly, the resultant consequences and remedies thereto as claimed by the plaintiff.

D **Findings Of The Court**

(i) Discharge Of The Charge Procured By Fraud And/Or Forgery

[29] It is undisputed that IDT1 together with the duplicate charge were handed to the Kuala Lumpur High Court for purposes of auction on 15 April E 2005 following the order for sale and these documents were at all material times in the custody of the High Court. They were only collected by Messrs Amirtha VS & Co, the solicitor for the successful bidder Perniagaan Myzul on 11 December 2009 for purposes of registration of the transfer of the property.

[30] From the evidence adduced, I am satisfied that the plaintiff had never F given any instruction to execute the discharge of the charge. PW3 who was the lawful attorney and authorised signatory of the plaintiff had strenuously denied that she signed the discharge form 16N dated 25 February 2008 by reason that the first defendant's loan remained unpaid at that time. This is corroborated by the testimony of PW4 that the plaintiff never gave any G instruction to its officers to execute the discharge of the charge. I have no reason to disbelieve both of them. In fact they have also lodged police reports to complain about the forged form 16N.

[31] In addition, the plaintiff engaged PW1, a handwriting expert to opine on the forgery of PW3's signature in the form 16N as alleged by the plaintiff. H PW1 is an amply qualified expert witness within the intent of s. 45 of the Evidence Act 1950 being a former chief document examiner at the Department of Chemistry Malaysia and director of chemistry at the Jabatan Kimia Malaysia Pahang. I have also received his expert evidence on handwriting in *Soon Poy Yong v. Westport Properties Sdn Bhd & Ors* [2014] 10 CLJ 686.

I **[32]** For purposes of this case, PW1 produced a signature verification report after undertaking a meticulous examination of PW3's contemporaneous specimen signatures with the impugned signature on the form 16N. He concluded that the impugned signature was most probably of different

authorship from that in the specimen signatures by reason of fundamental, significant and consistent differences observed upon comparison of the signatures. Again, I see no reason not to accept the testimony of PW1 which was detail and cogent.

[33] I have also exercised my power under s. 73 of the Evidence Act 1950 and required PW3 to sign her signatures before me five times on a blank sheet of paper (exh. P3) for comparison as well; see also *Siaw Kim Seong v. Siew Swee Yin & Anor* [2008] 5 CLJ 441. Even from a lay comparison, I am satisfied that the signature on the form 16N was distinctly different from that signed by PW3 in exh. P3.

[34] Thus from the totality of the evidence available before me, I find and hold that the signature in the form 16N discharge of the charge was a plain and undisguised forgery of PW3's signature as submitted by the plaintiff.

[35] Besides, it is seen that the advocate and solicitor, Tan Aik Thim who purportedly attested to PW3's signature in the form 16N is a fictitious lawyer as confirmed by the Malaysian Bar Council's letter dated 1 April 2014. Both PW3 and PW4 also testified that neither they nor the plaintiff knew or had any dealing with the aforesaid Tan Aik Thim.

[36] Although the plaintiff pleaded both fraud and/or forgery in respect of the discharge of the charge, it is apparent from the closing submission that the plaintiff only pursued forgery. In *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229, the Court of Appeal held that the standard of proof of forgery in a civil case is only on the balance of probabilities. I am satisfied that the plaintiff has met that required standard here.

[37] It is provided in s. 340 of the National Land Code as follows:

> 340. Registration to confer indefeasible title or interest, except in certain circumstances
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> (1) The title or interest of any person or body for the time being registered as a proprietor of any land, or in whose name any lease, charge or easement is, for the time being registered shall, subject to the following provisions of this section shall be indefeasible.
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> (2) The title or interest of any such person or body shall not be indefeasible:
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law

A (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

B (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body C claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred D by any such law; or

(b) the determination of any title or interest by operation of law.

[38] Consequently, I further find and hold that that the discharge of the charge is defeasible by virtue of s. 340(2)(b) of the National Land Code.

E *(ii) Transfer Of The Property From The First Defendant To The Second Defendant Procured By Fraud And/Or Forgery*

[39] It is seen from the documentary evidence adduced that around the time of the aforesaid discharge of the charge, the first defendant purportedly entered into a sale and purchase agreement of the property with the second F defendant. The property was subsequently transferred to the second defendant and duly registered on 24 March 2008 as evidenced by IDT2.

[40] At the trial, DW1 denied entering into the aforesaid sale and purchase agreement with the second defendant. She further contended that her signature that appeared in the sale and purchase agreement as well as the G transfer form 14A were also forged.

[41] Though the first defendant did not call a handwriting expert to opine on the impugned signatures, I have nonetheless again invoked s. 73 of the Evidence Act 1950 and directed DW1 to sign before me five signatures on H a blank sheet of paper (exh. D11).

[42] I have compared the signature in exh. D11 as well as those in the plaintiff's letter of offer of the loan facility dated 19 September 2002 and charge form 16A acknowledged by DW1 against that in the sale and purchase agreement. They are similar. By comparing them with the signature in the I sale and purchase agreement and the transfer form 14A both dated 14 January 2008, they are markedly different even from a lay and untrained eye.

[43] The second defendant was also not called by any party as a witness to enlighten the court. A

[44] In addition, it is also seen from the documentary evidence adduced that the advocate and solicitor, Sasi Kumar a/l Kandasamy who purportedly attested to DW1's signature in the sale and purchase agreement and transfer form 14A was struck off from the roll of advocates and solicitors on 7 March 2008 before the presentation of the transfer on 24 March 2008. Sasi Kumar a/l Kandasamy was thereafter charged and convicted under s. 420 of the Penal Code by the Petaling Jaya Sessions Court on 17 May 2012. DW1 also testified that she had never met Sasi Kumar a/l Kandasamy at all and I have no reason to disbelieve her especially from the photograph on the photocopy of her identity card attested to by Sasi Kumar a/l Kandasamy (exh. D15) produced by the third defendant that showed a different lady. B C

[45] The plaintiff pleaded and submitted on both fraud and forgery having occurred here. The plaintiff did not however identify the perpetrator of the fraud and I thus make no finding thereon. Nonetheless, I am satisfied and accordingly find and hold that the transfer of the property by the first defendant to the second defendant was procured by forgery on the balance of probabilities. D

[46] Accordingly, I further find and hold that the transfer of the property by the first defendant to the second defendant is defeasible by virtue of s. 340(2)(b) of the National Land Code. E

(iii) Fourth Defendant's Charge Impugned

[47] The plaintiff had also pleaded that the registration of the fourth defendant's charge was procured by forgery or fraud in that the signature of the second defendant in the transfer form 14A was manifestly different from that appearing in the fourth defendant's letter of offer dated 23 January 2008, loan facility agreement dated 21 March 2008 and the charge dated 21 March 2008 as well as that the fourth defendant's charge was fraudulently procured because at the material time the original issue document of title of the property and the duplicate charge were in the custody and control of the Kuala Lumpur High Court. F G

[48] As for the differing signature as alleged by the plaintiff, I noted that there were differences especially in the opening Chinese character of the second defendant's family name. However, I am not sufficiently convinced that there was forgery by mere comparison of the signature in the documents *per se* in the absence of the testimony of the second defendant and/or the opinion of a handwriting expert witness to that effect. H

[49] In respect of the plaintiff's allegation of fraudulent procurement of the registration of the fourth defendant's charge in light of the original issue document of title of the property having been in the custody and control of the High Court at the material time, the plaintiff has neither identified the I

perpetrator of the fraud nor led sufficient evidence on the scheme of the fraud other than the testimony of DW2 and DW3 of the third defendant that it was inexplicable as to why there were three original issue document of title of the property subsisting right up to the trial. I am therefore of the view that fraud has not been adequately established in the circumstances to the higher standard of proof beyond a reasonable doubt following *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd* [2006] 2 CLJ 409; [2006] 3 MLJ 1 and *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34.

[50] Nonetheless the problem does not end here because there remain two closely related points of law that may ultimately affect the legality and thus validity of the fourth defendant's charge over the property, *to wit*:

(i) whether the fourth defendant's charge is bad by reason that the second defendant's title to the property was *void ab initio* or at inception; and

(ii) whether the fourth defendant's charge is bad if the transfer of the title of the property from the first defendant to the second defendant is avoided.

[51] The first point of law on the concept of title *void ab initio* gained recent popularity and momentum following the cases of *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153; [2013] 7 MLJ 755 and *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271; [2012] 8 MLJ 713 where the plaintiffs were successful therein.

[52] The plaintiff too submitted herein that IDT2 was *void ab initio* since IDT1 was never destroyed by the third defendant before subsequent issue document of titles were produced and issued. The issuance of IDT2 was allegedly a grave failure on the part of the third defendant to adhere to the mandatory provisions of the 14th Schedule of the National Land Code. Hence all subsequent instruments that were registered including IDT3 were null and void.

[53] The fourth defendant however responded in a two-pronged manner. Firstly, the fourth defendant submitted that the concept of title *void ab initio* is inapplicable in Malaysia by virtue of the Torrens system as commented by Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia: Cases and Commentary*, 3rd edn (2012) LexisNexis at pp. 182, 183 and 202 with emphasis added:

> **Under the Torrens system, it is the act of registration that vests title or interest; once registered, the title or interest cannot be divested except otherwise statutorily provided** ... Theoretically, this is known as the 'indefeasibility of title', which is reflected in section 340 of our code under which it is provided that registration confers an indefeasible title or interest, until and unless that title or interest is challenged or set aside on any grounds set out in s. 340(2) ... The Torrens system is one of title by registration, that is, it is the act of registration that vests title or interest; it is not a system of registration or recordation of title. **Once registered,**

the title or interest cannot be divested except otherwise statutorily provided. Theoretically, this is known as the 'indefeasibility of title', which is reflected in s. 340(1) of our Code. Section 340(2) enumerates the circumstances under which a registered title or interest 'shall not be indefeasible'.

According to the fourth defendant, this proposition is supported in the *dicta* of Abdul Malik Ishak JCA in the Court of Appeal case of *Malayan Banking Bhd v Koay Kang Chuwan & Anor* [2010] 6 CLJ 172; [2010] 5 MLJ 46 as follows:

> [57] It is quite apparent that the Legislature intended to limit the grounds which could render a registered title or interest defeasible to those stipulated in s. 340(2) of the NLC. And where there is no evidence that the registered proprietor or the interest holder acquires registration by means of any of the vitiating grounds, then the indefeasibility of title or interest therein remains intact. However, the indefeasibility of title or interest may also be affected by the provisions in ss. 340(3) and 340(4) of the NLC.

Secondly and alternatively, the fourth defendant submitted that the cases of *Shayo (M) Sdn Bhd* (*supra*) and *Uptown Properties Sdn Bhd* (*supra*) were cases on clash of titles where the computerised titles were issued in the name of a stranger as the registered proprietor. This is clarified by Harminder Singh Dhaliwal J in *Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party)* [2014] 8 CLJ 107 at pp. 120 to 121:

> [19] At first sight, this contention appears to be compelling given what was held in *Shayo* and *Uptown*. *However, a careful perusal unveiled, in my view, a material distinguishing factor between these two cases cited and the instant case. In the two cases cited, there was really a clash of titles between two different personalities.* In the instant case, the plaintiff did not lose ownership of the said property with the issuance of the computerised IDT. Ownership was lost through the fraudulent use of the computerised IDT in the plaintiff's name. (emphasis added.)

[54] I have earlier in *Soon Poy Yong* (*supra*) held as follows in respect of the concept of title *void ab initio*:

> ... it seems to me that the title registered and issued by the land registry would be *void ab initio* or at inception in rather narrow and limited factual circumstances. This occur when the land registry wrongfully registered and issued a replacement land title in the name of another person thereby depriving the original title holder's constitutional right of ownership of land. In *Tan Chiw Thoo v. Tee Kim Kuay* (*supra*), the land registry registered and issued a second title to the appellant who occupied the lot notwithstanding that the lot was earlier registered and title issued to the respondent. Likewise in *Shayo (M) Sdn Bhd* (*supra*), the land registry during its own exercise of issuance of computerised titles mistakenly registered the land in the name of the first defendant when the original manual land

A title that was in the name of the plaintiff was still in his possession. The land was subsequently transacted using that computerised title. A similar situation occurred in *Uptown Properties Sdn Bhd* (*supra*). Put simply, the land title would be *void ab initio*, if and only if, the land registry had in blatant breach of its duty under the National Land Code wrongfully registered any land in the register document of title and issued the replacement issue B document of title in the name of a third party.

[55] In this regard, I respectfully differ from the views of learned authors of *Land Law in Malaysia: Cases and Commentary* that the concept of title *void ab initio* has no place within the Torrens system if they indeed meant as such as submitted by the fourth defendant. The Federal Court in *Krishnadas* C *Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94 concluded that the term "operation of law" allows for further exceptions to upset an indefeasible title, besides that provided for under s. 340(2) of the National Land Code. Gopal Sri Ram JCA (as he then was) said at pp. 99 to 101 as follows:

D

> In *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 MLJ 224, a case decided under the Land Code, Gill FJ (as he then was) when applying the decision in Yong Joo Lin said (at p 232):
>
> > The Term 'operation of law' in sub-s. (vi), as Das on *Torrens System in Malaya* points out at p. 235, is a generic term deliberately used E by the legislature to grant relief in cases where contractual or conscientious obligations (importing a breach of duty to which equity has attached its sanction) are undertaken by or imposed on the registered proprietor either at law or in equity ...
>
> We are of opinion that the views expressed by Terrell AG CJ in *Yong Joo* F *Lin* and by Gill FJ in *Ong Chat Pang* accurately reflect the meaning and effect of s. 340(4)(b) of the Code. We also accept what was said by Faiza Tamby Chik J in *Dr Benjamin George* as a correct statement of the law.
>
> In our judgment, Parliament enacted s. 340(4)(b) for the purpose of dealing with fact patterns that do not fall squarely within the other G exceptions to indefeasibility that appear in the second subsection to s. 340 of the Code. While recognising that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s. 340(4)(b), we cite, by way of illustration only, cases decided under the Moneylenders Act 1951 ...
>
> H Based on the authorities that have settled the law relating to the construction of statutes, we are unable to accept that Parliament intended s. 340(4)(b) to have no effect whatsoever or to lack in meaning. Quite to the contrary, we are of the view that the subsection ought to receive the construction it has received in the cases earlier discussed.

I The concept is in my view recognised and provided for in s. 340(4)(b) of the National Land Code though it may be of limited and infrequent utility.

[56] Consequently and since all the three issue document of title IDT1, IDT2 and IDT3 showed the first defendant as the registered proprietor of the property, the concept of title *void ab initio* is inapplicable herein to defeat the fourth defendant's charge over the property.

[57] Nevertheless, it remains a great mystery at the trial as to how three issue document of title of the same property subsisted at the same time without the destruction of two of them as required by law in the 14th Schedule to the National Land Code. DW2 and DW3 who testified for the third defendant and who signed on IDT2 and IDT3 respectively could not enlighten the court as to why and how it happened. DW8 produced in court the summary list of titles issued for the property known as "senarai pengesahan pergerakan versi" (exh. D20). It is seen that the land registry records were incomplete, particularly in that there were no records showing the progression of issue document of title version three to version five.

[58] In the circumstances, I can only conclude that there was gross and blatant maladministration on the part of the third defendant indicative of acts of collusion between certain officers of the land registry and outsiders. In other words, the third defendant was plainly in breach of its statutory duties.

[59] Although IDT2 and IDT3 were not *void ab initio*, they are to my mind defeasible pursuant to s. 340(2) of the National Land Code. In *Low Poh Kim v. Pengarah Tanah dan Galian Negeri Selangor & Ors* [2014] 3 CLJ 897, Prasad Sandosham Abraham J (now JCA) held as follows at pp. 902 to 903 and 907:

> [6] With regards to the issue document of title, the plaintiff produced to court the original issue document of title and its veracity was not challenged. If that being the case, how could a transfer have been registered on the basis of a computerised title ('IDK') being issued. The relevant provisions of the National Land Code, ie, s. 5A and the 14th Schedule in the National Land Code clearly set out the procedure that must be followed, before a computerised title could be issued to replace the old title in particular s. 8 of the 14th Schedule and in particular sub-s. 9, ...
>
> [7] It is clear, that there was no evidence led to show the plaintiff had taken delivery of the computerised title and the fact the original title was in the possession of the plaintiff and the same was produced in court, clearly shows that sub-s. 9(d) in particular had not been complied with ...
>
> **[12] In my judgment, the IDK ie, the computerised titled issued was an insufficient and void document and therefore any transaction based on the same would be defeasible.** I refer to my decision in *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* reported in [2012] 3 CLJ at p. 271, where I held in (2) & (3) and I quote:
>
> (2) In order for the computerised title to be issued pursuant to s. 5A of the NLC, a notice must be sent by the plaintiff to surrender the old title in exchange for the new computerised one. On the facts,

A there was no evidence to suggest that such notice had been sent. This was in contravention of the 14th schedule to the NLC. (paras 8 & 10)

(3) The issuing of a computerised title to the 4th defendant as a registered proprietor when the original title to the said land
B continued to be in the possession of the plaintiff was *ultra vires* as it contravened the provisions of the s. 5A of the NLC and 14th Schedule and also s. 340(2)(c) of the NLC. It follows therefore that any instrument executed by the director of the 4th defendant would be void and insufficient *per se*. (para 17) (emphasis added.)

C **[60]** I am in agreement with and adopt His Lordship's views, save with respect, that the defeasibility in such circumstances should instead be pursuant to s. 340(2)(c) instead of s. 340(2)(b) of the National Land Code.

[61] Consequently and notwithstanding that I have earlier found and held the transfer of the property from the first defendant to the second defendant
D to be defeasible by reason of forgery, the title of the second defendant is also defeasible by reason that it has been unlawfully acquired from the third defendant inexplicably and I so find and hold accordingly here.

[62] The second point of law concerns the legal status of the fourth defendant's charge if the second defendant's title is defeated. I have already
E found the transfer of the title to the second defendant to be defeasible. Consequently, if the transfer and title as registered in favour of the second defendant are avoided, the fourth defendant's charge must necessarily be avoided too because its underlying substratum has been impugned as well by operation of law; see s. 340(3)(b) of the National Land Code and I so find
F and hold accordingly as well.

(iv) Fourth Defendant's Charge Acquired In Good Faith For Valuable Consideration

[63] In any event, the fourth defendant submitted that it was at all material times a *bona fide* chargee for valuable consideration and its interests therefore
G remained indefeasible pursuant to the proviso to s. 340(3) of the National Land Code.

[64] The transfer of the title of the property from the first defendant to the second defendant and the fourth defendant's charge were both registered and endorsed in a single document, *to wit*, IDT3. From the land search done on
H the property on 20 January 2009, it is further seen that both the transfer of the title and the charge were both registered at precisely 10.47:56 am on 24 March 2008.

[65] The fourth defendant submitted that the registration of the transfer of the title to the second defendant's title and the charge of the fourth defendant
I were two distinct dealings pursuant to Presentation No. 21946/2008 and Presentation No. 21947/2008 respectively. In the premises, the charge was created after the transfer of the title and the fourth defendant is consequently the holder of a subsequent interest in the property.

[66] I am however unable to accept the submission of the fourth defendant that it was the holder of an interest subsequent to the transfer of the property to the second defendant. In spite that the transfer and charge were presented separately using different instruments, this is to my mind immaterial. The transfer and charge were for all intents and purposes inextricably connected by reason that the charge was to secure the chargee's interest in financing the transfer. More importantly, the effective time and date of the registration of the transfer and charge were synonymous as entered by the registrar in the memorial of registration in the register. Put simply, both of them took effect concurrently. It is observed that s. 304(4) of the National Land Code provides that:

> Every memorial of registration made pursuant to this section shall be conclusive evidence of the registration to which it refers and the effective time and date thereof.

[67] In the Federal Court case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269, Ariffin Zakaria CJ Malaya (now CJ) said as follows at p. 294:

> *Furthermore, eventhough sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s. (2), they are restricted to subsequent transfer or interest in the land subsequently granted thereout. So, it could not apply to the immediate transferee of any title or interest in land. Therefore, a person or body in the position of Adorna Properties could not take advantage of the proviso in sub-s. (3) to avoid its title or interest from being impeached.* It is our view that the proviso which expressly stated to be applicable to sub-s. (3) ought not to be extended as done by the court in *Adorna Properties*, to apply to sub-s. (2)(b) ... For the above reasons, with respect, we hold that the Federal court in *Adorna Properties* had misconstrued s. 340(1), (2) and (3) of the NLC and came to the erroneous conclusion that the proviso appearing in sub-s. (3) equally applies to sub-s. (2). By so doing, the Federal Court gave recognition to the concept of immediate indefeasibility under the NLC which we think is contrary to the provision in s. 340 of the NLC. (emphasis added)

[68] Hence and by reason that the fourth defendant's charge took effect concurrently with the transfer, I find and hold that the fourth defendant could not take advantage of the proviso in s. 340(3) of the National Land Code. In other words, the charge is defeasible even if the fourth defendant was a *bona fide* chargee for valuable consideration because the charge was not an interest in the property that was subsequently granted out.

[69] Be that as it may, the plaintiff has gone on to submit that the fourth defendant failed to establish that it was a *bona fide* chargee. It is not in dispute that the fourth defendant provided valuable consideration by having disbursed the loan to the second defendant to purchase the property.

[70] The meaning of *bona fide* purchaser or commonly known as the good faith purchaser had been considered by the Court of Appeal in *State Tailor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167; [2005] 2 MLJ 589. In that case, Richard Malanjum JCA (now CJ Sabah and Sarawak) said at p. 184 (CLJ); p. 603 [44]:

> The term '*bona fide* purchaser' has been used in a host of cases. **Simply put it means a buyer in good faith. And the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry of the transaction.** But the overriding consideration is the 'Particular circumstance of each case' ... (emphasis added)

[71] Furthermore, in another Court of Appeal case of *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526, Raus Shariff JCA (now PCA) said at p. 554 [42] to [44]:

> Had the learned trial judge taken the above facts and circumstances into consideration, he cannot possibly conclude that the 1st defendant was a *bona fide* purchaser for valuable consideration, so as to be protected under s. 340(3) of the Code. To me, the 1st defendant had acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the plaintiffs. This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the plaintiffs. In such circumstances the court must not favour the 1st defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs.
>
> Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the 1st defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v. Hinton* [1899] Chancery Division 264 Lindley MR said:
>
> > **To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgage of her priority would be the greatest injustice.**
>
> *So too here. The 1st defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.* (emphasis added)

[72] In this regard, the plaintiff pointed to several instances whereby the fourth defendant allegedly failed to take the ordinary precautions, *to wit*:

(i) the fourth defendant solely relied on the valuation report of Nilai Harta Consultant Sdn Bhd, a panel valuer of the fourth defendant that was grossly negligent in the undertaking of the valuation of the property;

(ii) the fourth defendant's conveyancing solicitors only carried out a land search on the property on 24 March 2008 as pleaded, just prior to the presentation of the registration of the transfer and charge; and

(iii) the fourth defendant's conveyancing solicitors never sighted the original issue document of title of the property and the transfer form 14A.

[73] From the plaintiff's cross examination of DW7 and DW9 at the trial as well as the testimony of PW5 and PW6, I am satisfied that the valuation report was certainly negligently, if not recklessly produced because of the numerous serious errors found therein, *to wit*: wrong identification of the exact location of the property, omission in describing that the property was immediately adjacent to a Hindu cemetery with crematoriums on the opposite side and concocted photographs depicting the interior of the bungalow house. The valuation that was undertaken in simple comparison with other houses nearby in Petaling Jaya without adjustment made for the unique characteristic of the property being adjacent to the cemetery is thus gravely flawed. It was undoubtedly an unprofessional job done by the panel valuer of the fourth defendant probably in collusion with the seller or purchaser to inflate the valuation so that the purchaser could secure a much higher loan amount for the purchaser/borrower. It is not in dispute that the fourth defendant, *to wit*, its outstation branch in Bentong, Pahang solely relied on the valuation report in granting and disbursing the loan of RM2,096,836 to the second defendant. There is however no evidence of any bank officer of the fourth defendant visiting the site of the property or making independent inquiries thereto including from its branch in Petaling Jaya.

[74] From the testimony of DW10, I find that the fourth defendant's conveyancing solicitors who were also outstation based in Raub, Pahang did not carry out a land search on the property since he was neither able to recall nor produce records of the land searches. This is a serious aberration to normal conveyancing practice wherein DW10 himself admitted that the fourth defendant would not execute any loan documentation without prior obtaining the land search results. The fourth defendant's letter of offer of the loan facility was issued to the second defendant on 21 January 2008. If the land search had been conducted, the existence of the plaintiff's charge over the property might have been discovered in late January or early February 2008 and this would undoubtedly influence the decision of the fourth defendant whether to continue with or revoke the loan facility offer.

[75] Besides, it is not in dispute that the fourth defendant's solicitors never sighted the original issue document of title and the transfer form 14A to be presented to the Shah Alam land registry. In fact, DW10 agreed to an arrangement with Sasi Kumar a/l Kandasamy wherein the latter's clerk would hand them over to the former's clerk for presentation at the Shah Alam registry itself.

[76] This is in my view another instance of aberration to normal conveyancing practice. The fourth defendant in this regard called an expert witness DW13 who is an advocate and solicitor who had practised for more than 21 years in property conveyancing. He testified as follows with emphasis added:

> A. Mr Yam Chung Keat could have, prior to the making of the presentation, sighted the Memorandum of Transfer (MOT) and the original title deed to the Subject Property for the purposes of verifying the particulars of the Subject Property for the purposes of verifying the particulars of the Subject Property and details of the registered proprietor of the Subject property at that material time. In this regard, I wish to stress that:
>
> (a) **such conduct is not intended to detect any form of fraud unless it is glaring obvious:**
>
> (b) such omission on the part of Mr Yam Chung Keat ought not to be considered as breach of his professional obligation.
>
> Q. Ok, since you have gone through this particular part of the Yong statement, I see you answer in question five you have mentioned there is an omission on Mr Yam's part for not citing(sic) the title in the MOT?
>
> A. Yes, *basically what happens is that in most circumstances in conveyancing practice we would ask that the title and transfer documents, the MOT, be forwarded to us to do the presentation. Also for us to look through the documents* ... (emphasis added)

[77] That notwithstanding, cl. 4.2 of the sale and purchase agreement of the property between the first defendant and the second defendant provides (with emphasis added) that:

> Subject to clause 4.1 herein, upon receipt of the Financier's Letter of Undertaking, the said Solicitors are hereby authorised by the parties hereto to **release the Transfer and other relevant documents to the Purchaser's Financier's Solicitors** to enable the said Property to be charged to the Purchaser's Financiers to facilitate the release of the Loan Sum, and for this purpose the **Vendor shall release or cause to be released the issue document of title of the said Property to the Purchaser's Financier's Solicitors.** (emphasis added)

[78] As asserted by the plaintiff, if the fourth defendant's solicitors had taken prior possession of the transfer form 14A and the issue document of title, the solicitors could have been alerted to the discrepancy in the signature

of the second defendant as well as the authenticity of the issue document of title which might be glaringly questionable. In *Soon Poy Yong v. Westport Properties Sdn Bhd & Ors* [2014] 10 CLJ 686, I have held as follows:

> On the plaintiff's non-deployment of any personnel to check and authenticate the validity of the land titles that were presented for registration and thereby allowed the fake title IDT2 to be used to transfer the land, I am of the view that there was no duty of care on the part of the 19th defendant to do so and the plaintiff had not submitted any case authority to convince me otherwise. From the provisions of the National Land Code, it is my view that the duty, if any, should by owed by the officer designated in s. 211 read with the Fifth Schedule of the National Land Code, often the conveyancing advocate and solicitor who attested to the instruments of transfer and charge creation. The function of the land office was merely administrative to register the title or interest so long the requisite instruments and documents as presented were complete.

I have further noted that the issue document of title used for this transfer was never produced in court. There is hence the possibility that the issue document of title might not even be in existence at that material time. I am mindful that Lee Swee Seng J in *Yew Foo Chun v. Wong Nye Keong & Ors* [2014] 1 LNS 189 was of the view that it was not a requirement in law nor a practice for the vendor to allow the purchaser to examine the original physical copy of the title but rather to ascertain the owner and other details through a land search. In this case however, the fourth defendant's solicitors not only had the right to take possession of the title by virtue of the sale and purchase agreement but also failed to carry out the required land search.

[79] The ascertainment whether one is a *bona fide* purchaser or holder of interest for valuable consideration is essentially a question of fact which will vary from case to case. In the case herein, the fourth defendant relied on the advice of its professionals pertaining to the valuation of the property as well as the charge documentation and presentation. This is understandably the norm. Nevertheless I am of the view that any failure by these professionals in taking the ordinary precautions as alluded to in *Au Meng Nam & Anor* (*supra*) must be imputed upon the fourth defendant. Hence, the fourth defendant is not exonerated by having delegated these functions to its professional agents. In fact the fourth defendant ought to have been even extra vigilant here because this was an outstation transaction where the fourth defendant as the financier itself and its solicitor were operating outside the state where the property was situated. The fourth defendant ought to have independently satisfied itself by deploying its officers to inspect the property if not also to oversee the transaction.

[80] The three instances of failure as pointed by the plaintiff were material and would in my view have undoubtedly impacted the decision of the fourth defendant in the creation of the charge. They collectively showed that the fourth defendant was grossly careless to the detriment of the plaintiff who is

now vexed with a competing charge over the property. There is the lurking suspicion that the fourth defendant was just too keen to close the loan financing deal with the second defendant herein.

[81] In the circumstances, I also find and hold that the fourth defendant's interest in the charge failed to qualify as that acquired in good faith pursuant to the proviso to s. 340(3) of the National Land Code.

(v) Negligence Of The Third Defendant

[82] The plaintiff's case against the third defendant in crux is that the third defendant was negligent in failing to exercise due care and skill by issuing instead of abstaining from the production of different versions of the issue document of title of the property. This is notwithstanding that the original issue document of title was in the custody and control of the High Court.

[83] The elements of negligence has been succinctly set out by the Court of Appeal in *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585, wherein Gopal Sri Ram JCA (as he then was) said:

> First, he must show he owed a duty of care by the defendant to take reasonable care. Second that the defendant breached that duty, third, that the resultant breach caused the harm in question and fourth that he (the plaintiff) suffered damage that is not too remote.

[84] The existence of the duty of care on the part of the third defendant is a given. Based on my findings in the foregoing paras. [57] and [58], that duty of care was undoubtedly breached. Nevertheless, the tort is still inchoate unless the plaintiff has also suffered loss and damage as the result of the breach. This is dependent on my findings hereinbelow on the resultant consequences.

(vi) Resultant Consequences

[85] My findings so far are summarised as follows:

(i) the discharge of the charge is defeasible pursuant to s. 340(2)(b) of the National Land Code;

(ii) the transfer of the property by the first defendant to the second defendant is defeasible pursuant to s. 340(2)(b) or s. 340(2)(c) of the National Land Code;

(iii) the fourth defendant's charge over the property is defeasible pursuant to s. 340(3)(b) of the National Land Code; and

(iv) the fourth defendant's interest in the charge was not acquired in good faith, thus the proviso to s. 340(3) of the National Land Code is not attracted.

[86] The plaintiff has in its re-amended statement of claim prayed for declarations that the discharge of the charge, transfer of the property from the first defendant to the second defendant and the fourth defendant's charge be

declared null and void and of no effect. I see no reason not to grant the declarations as prayed since the discharge of the charge, transfer and fourth defendant's charge are all defeasible.

[87] As the result thereof, the plaintiff's claim in negligence against the third defendant becomes unsustainable and redundant by reason that the plaintiff would not suffer any loss and damage once the declarations sought are granted. It is also unnecessary to consider the other defences sought by the third defendant.

[88] The plaintiff also claimed for damages against the first and second defendants but the causes of action against them were not specifically and clearly pleaded. In any event, the plaintiff would also not suffer any loss and damage claimable against them once the declarations sought are granted.

Conclusion

[89] In the premises, I enter judgment for the plaintiff in the terms of the prayers in paras. 23(a) and (b) of the re-amended statement of claim.

[90] There shall be no order as to costs between the plaintiff and the first to third defendants but the fourth defendant shall pay the plaintiff costs of RM70,000.